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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 316

W. C. NABORS d/b/a W. C. NABORS COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, W. C. Nabors, an individual doing business as W. C. Nabors Company, respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 29, 1952 [1] granting the petition of the National Labor

[1] Rehearing denied June 6, 1952.

Relations Board for the enforcement of an order which it issued against the petitioner on April 19, 1950. (Tr. Vol. I, 67)[2]

Opinion Below

The findings of fact, conclusions of law and order of the National Labor Relations Board (Tr. Vol. I, 67 *et seq.*) are reported in 89 N.L.R.B. 538. The opinion of the Court of Appeals is reported in 196 F. 2d 272.

Jurisdiction

The judgment of the Court of Appeals was entered on April 29, 1952; petition for a rehearing was filed on June 2, 1952, pursuant to Order of the Court extending time to file motion for rehearing; and the motion for rehearing was denied on June 6, 1952, without opinion. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (Act of June 25, 1948, Ch. 646, Sec. 1; 62 STAT. 928) and 29 U.S.C., Sec. 160(e) (Act of June 23, 1947, Ch. 120, Title I, Sec. 101; 61 STAT. 146)

Questions Presented

1. Whether the findings of the Board with respect to questions of fact are supported by substantial evidence on

[2] Pursuant to stipulation of Counsel, the record on the petition in the present case consists of (1) transcript of record printed by the Court below; (2) the appendices of the briefs containing parts of the record relied upon by each party and submitted by the petitioner and the Board in the Court of Appeals; and (3) a typewritten transcript of the entire record lodged with the Clerk. The printed transcript of the record in the Court below has been designated as Vol. I, and the appendices of the petitioner and the Board have been designed as "R.A." and "B.A.", respectively. In the event the writ is granted a record will be printed by the Clerk pursuant to stipulation of the parties.

the record considered as a whole.

2. Whether the Court of Appeals discharged its duty to canvass the record as a whole and take into account whatever in the record fairly detracted from the alleged substantiality of the evidence relied on by the Board.

3. Whether the decision of the Court below is in real conflict with the decision of the Court of Appeals for the Sixth Circuit in PITTSBURGH S. S. CO. v. NATIONAL LABOR RELATIONS BOARD, 180 F. 2d 731.

4. Whether the decision of the Court below, in other respects, is in real conflict with the decisions of this Court and the Courts of Appeals of the several circuits.

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (Act of June 23, 1947, Ch. 120, Title I, Sec. 101, 61 STAT. 136; 29 U.S.C. 151, *et seq.)* are as follows:

> "Par. 157. Right of employees as to organization, collective bargaining, etc.
>
> "Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (As amended June 23, 1947, 3:17 p.m., E.D.T., ch. 120, title I, Par. 101, 61 Stat. 140.)

"Par. 158. Unfair labor practices.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; * * * "

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

"Par. 160. Prevention of unfair labor practices—(c) Reduction of testimony to writing; findings and order of Board.

"The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter; *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in

deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(e) Petition to court for enforcement of order; proceedings; review of judgment.

"The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), within any circuit or district, respectively, which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), wihin any circuit or district, respectively,

wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Summary Statement

Pursuant to charges and amended charges (Tr. Vol. I, pp. 13, 16) filed by H. V Smith and Charles J. Trepagnier, Business Agent and District Representative, respectively, of the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, A.F.L., Local Number 79, the National Labor Relations Board, on November 2, 1948, issued its complaint (Tr. Vol. I, 19) and notice of hearing (Tr. Vol. I, 26) which were duly served on petitioner.

The complaint charged that petitioner was in violation of Sections 8(a) (1) and 8(a) (3) of the Act in that he "did discriminate and is discriminating in regard to the hire and tenure or terms or conditions of employment of certain employees therein named," thereby discouraging membership in the Union", and that petitioner "did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act" (Tr. Vol. I 24, 25).

Petitioner seasonably filed an answer denying all of the material allegations of the complaint (Tr. Vol. I, 28).

Hearings on the complaint were held at Mansfield, Louisiana, on various dates between December 7, 1948 and January 15, 1949, and an Intermediate Report, sus-

taining all of the alleged charges, with the exception of a few, was rendered on October 26, 1949 (Tr. Vol. I, 94).

Petitioner filed exceptions and objections to the Intermediate Report (Tr. Vol. I, 47, et seq.). On April 19, 1950, the Board rendered its Decision and Order in which it held, contrary to the findings of the Trial Examiner, that petitioner did not violate Section 8 (a) (1) of the Act in granting a wage increase on March 15, 1948, and that he was economically justified in laying off some of his employees on April 8, 1948. The Board further held that five of the employees who had been laid off by the petitioner on April 8, 1948 had not been discriminatorily discharged, as found by the Trial Examiner. However, it further found that petitioner had discriminatorily discharged 19 of his employees because of their Union activities and in so doing that he had violated Sections 8 (a) (1) and 8 (a) (3) of the Act; ordered reinstatement with back pay to said 19 employees; further ordered petitioner to cease and desist from the unfair labor practices found to have been committed and to post the usual notices (Tr. Vol. I, 67 et seq.).

The facts and circumstances upon which the Board predicated its charges and based its findings and conclusions are shown by the record to be as follows:

Petitioner is an individual engaged in the manufacture of trailers and truck bodies in Mansfield, Louisiana (R.A. 241). During the 10 years preceding this dispute petitioner's working force had fluctuated from 223 persons, 174 in production, to 498 persons, 410 of whom were in production (R. A. 257-258). His employment peak, which was also the peak of production inefficiency, was reached in the spring of 1947. In order to increase the efficiency of his production in man hours, petitioner during 1947, began to decrease the number of his employees, so that

165 employees were terminated during that year. (R. A. 258, 259).

During 1947 and 1948, other factors entered into his reasons for terminating many of his employees. That was a consistent reduction in sales, coupled with his inability to obtain sufficient steel for the requirements of his operations (R. A. 243-248). The steel shortage was made more acute by the nation-wide coal strike on March 15, 1948 (R. A. 249-250), and on April 8, 1948 petitioner was advised by one of his principal steel suppliers that all orders which he had placed with this supplier would be set back 30 days (R. A. 251).

Therefore, as a result of the above factors, petitioner found it necessary to further reduce his working force during 1948 (R. A. 260-261), and the Board found that petitioner was economically justified in so doing (Tr. Vol. I, 72).

Meanwhile, on March 13, 1948, two of petitioner's employees called at the office of H. V. Smith, Business Agent of the Union, at Shreveport, Louisiana, and discussed with Smith the possibility of organizing petitioner's employees (R. A. 2). Smith advised them to return to Mansfield and, through discussions with fellow employees, to determine whether sufficient interest in the Union could be aroused (R. A. 3).

Having been advised that there was a group of employees interested in organizing the plant, Smith arranged a meeting for March 21, 1948 in Shreveport, Louisiana, and 26 of petitioner's employees attended (R. A. 3-4).

Petitioner first learned of the Union activities on March 25, 1948, "through a general grapevine rumor" (R. A. 268). He immediately instructed all his foremen that as he understood the law, he was responsible for their utterances and that consequently he wanted them to make it clear to

his employees at every opportunity that the employees had the right to join or refrain from joining a Union as they saw fit (B.A. 104, 293; R. A. 96, 99, 275, 333, 418).

On March 26, 1948, at 2:00 P.M., petitioner delivered a speech to his employees (R. A. 274). The speech was taken down verbatim by petitioner's secretary at the time petitioner made it, and he later referred to a transcript of his said speech to refresh his recollection, during his testimony before the Trial Examiner (R. A. 204, 282, 334).

In his speech, petitioner stated that every employee could join or refrain from joining a union as he saw fit; that each employee could vote for or against the union as he saw fit and that no employee would be discrminated against because of union activities (R. A. 274, 275, 334). Most of the Board's witnesses agreed that petitioner had made these statements (B. A. 42; R. A. 31, 43, 46, 49-51, 193, 220-222). Petitioner further stated that if the plant were unionized each man would be required to perform only the one particular job required by his craft and upon completion of his job he would have to punch out, and he then posed the rhetorical question:

"If the union came in, would it be good business on my part to run the extra hours and pay time and a half or to employ more men and run 40 hours?" (B. A. 63; R. A. 282). He further urged the men to pursue union matters outside of the plant and not on company time, but this was not intended to be a company rule, and it was never enforced (R. A. 295, 334, 335).

Thereafter, at 4:00 P.M. on the same day, petitioner met with H. V. Smith, who at that time made a demand for recognition which petitioner refused, saying that he doubted that the union represented a majority of his employees (R. A. 268).

On March 26, 1948, one Norwood was dismissed from

the electrical maintenance department, because the volume of work in that department had declined by two-thirds of the former volume. Norwood had shown his dissatisfaction with his job by laying off on two occasions previously, giving as a reason that he was hunting a better job; consequently petitioner had not dismissed him before because he was in hopes that Norwood would leave voluntarily (R. A. 330, 331)

On April 8, 1948, petitioner posted a notice on the bulletin board advising his employees that, due to the critical situation of steel supplies together with the increasingly dark outlook brought about by the coal strike, it was necessary to reduce the working force without delay. The notice further stated that economic necessity required petitioner to retain only those men to whom he could give sufficient work in order that they could make a satisfactory income to meet present living costs (R. A. 56). Accordingly, 23 men were dismissed on that date. None of these employees were replaced, and not until October, 1948, did petitioner hire additional men, at which time he hired 7 former employees, one of whom had been laid off in April, 1948 (R. A. 350, 351).

Thereafter, on September 14, 1948, pursuant to the Union's petition for certification of a bargaining representative, an election was held among petitioner's employees, resulting in the defeat of Union representation. On August 25, 1948, the Union had filed its amended complaint which culminated in the Board's order and Decision here under consideration.

Specifications of Error To Be Urged

The Court of Civil Appeals erred:

1. In failing to canvass the record as a whole and take into account whatever in the record fairly detracted from

the alleged substantiality of the evidence relied on by the Board.

2. In holding that the Board's findings are supported by credible evidence, despite the Court's specific finding that "the evidence as to reasons for discharging these employees is in sharp conflict" and that the evidence with respect to said discharges relied on by the Board in its findings was "in some respects circumstantial and contradictory".

3. In holding, in effect, that petitioner's unrelated non-coercive expressions of opinion on union matters were evidentiary of a general course of unfair labor conduct.

4. In holding, in effect, that petitioner was responsible for, or had ratified the unsolicited or unauthorized acts of certain of his supervisors.

Reasons For Granting the Writ

I.

The Court of Appeals misapprehended the "substantial evidence test" enacted by Section 10(e) of the Taft-Hartley Act and interpreted by this Honorable Court in Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474

A. The decision of the Court of Appeals clearly manifests that it failed to canvass the record as a whole and take into account whatever in the record fairly detracted from the alleged substantiality of the evidence relied on by the Board

1.

The Court of Appeals concluded that respondent in a speech to his employees on March 26, 1948:

> "* * *also made it clear * * * that if the plant was unionized he could shut it down, and thus a lot of employees would lose the homes they were purchasing and would be unable to support their families".

This conclusion of the Court of Appeals is entirely erroneous and finds no support whatever either in the Record, the Intermediate Report of the Trial Examiner (Tr. Vol. I, 102) or the Decision of the Board (Tr. Vol. I, 67-93). This error of the Court clearly demonstrates its failure to canvass the record as a whole. UNIVERSAL CAMERA CORP. v. NATIONAL LABOR RELATIONS BOARD, 340 U.S. 474, 488.

2.

Despite the uncontradicted testimony of petitioner that it was his established policy to consider merit and satisfaction with one's job, rather than seniority, in laying off or discharging his employees (B. A. 16, 111, 258; R. A. 49, 288,

291, 330, 331), the Board nevertheless substituted its judgment for that of petitioner in determining that petitioner should have laid off or discharged the employees here involved in the order of their seniority (Tr. Vol. I, 75-84). The Court of Appeals approved the Board's decision in this regard, by stating:

> "Even though the economic conditions did necessitate a reduction in respondent's employees, the Board's conclusion that those to be discharged were discriminatorily selected is reasonable, if not inescapable when it is considered * * * that sixty or more employees were retained who had less seniority than those discharged" (196 F. 2d 275, 276).

The decision of the Board in this regard, and the express approval thereof by the Court of Appeals is clearly contrary to the settled decisions of this Honorable Court that "the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them". NATIONAL LABOR RELATIONS BOARD v. JONES AND LAUGHLIN STEEL CORP., 301 U.S. 1, 45; PHELPS DODGE CORP. v. NATIONAL LABOR RELATIONS BOARD, 313 U.S. 177, 182, 183. The decision of the Board and the Court of Appeals in this respect is likewise contrary to the decisions of the Courts in the seventh and eighth circuits. NATIONAL LABOR RELATIONS BOARD v. ALUMINUM GOODS MANUFACTURING CO, 7 Cir., 125 F. 2d 353; NATIONAL LABOR RELATIONS BOARD v. WILLIAM DAVIES CO., 7 Cir., 135 F. 2d 179; AMERICAN SMELTING AND REFINING CO. v. NATIONAL LABOR RELATIONS BOARD, 8 Cir., 126 F.2d 680; NATIONAL LABOR RELATIONS BOARD v. AMERICAN PEARL BUTTON COMPANY, 8 Cir., 149 F. 2d 258. In the latter case, the Court said:

> "Whether or not the employer in the exercise of his managerial judgment is just or unjust, wise or unwise,

> is not a matter of concern, and the Board's inquiry must be confined to the question as to whether or not the employees have been discriminated against because of their Union activities or affiliations".

The decision of the Board and the Court of Appeals on this question also conflicts with the statement of this Honorable Court that, "Seniority arises only out of contract or statute. An employee has 'no inherent right to seniority in service * * * ' *Ryan v. New York C. R. Co.*, 267 Mich. 202, 208, 255 N.W. 365; *Casey v. Brotherhood of Locomotive, F. E.*, 197 Minn. 189, 191, 192, 266 N.W. 737". TRAILMOBILE Co. v. WHIRLS, 331 U.S. 40, 53, note 21; EDELSTEIN v. DULUTH MISSABE AND IRON RANGE RY. Co., 225 Minn. 512, 31 N.W. 2d 465; 14 LABOR CASES §64,383.

3.

The Court of Appeals stated that on March 26, 1948:

> " * * * Nabors delivered a speech to his employees, in which he outlined their privilege of either joining or not joining the union, their right to vote for or against the union, and advised them of the possibility of their work week being reduced from 45 to 40 hours, because of overtime pay requirements, should respondent's plant be unionized, which would result in a reduction of their 'take home' pay".

The above-quoted language in regard to the reduction of the work week was based upon the Intermediate Report of the Trial Examiner, which credited such testimony to five of the Board's witnesses, among them being one, B. B. Norwood. The record fails to support the Trial Examiner's statement that Norwood so testified. The alleged substantiality of the evidence relied on by the Trial Examiner and the Board consisted of the vague, contradictory, confused and

unsatisfactory testimony of four of the Board's witnesses (R. A. 96, 193, 194, 197, 203) (testifying from recollection more than eight months after the occurrence) and of lifting out of context a rhetorical question of no significance or probative value (R. A. 282).

The Trial Examiner discredited petitioner's denial that he had threatened to reduce the number of hours in the work week (R.A. 282), despite the fact that petitioner, during his testimony, referred to an exact copy of his speech of March 26, 1948, his speech having been transcribed verbatim by his secretary at the time it was made (R. A. 204, 334). The evidence relied on by the Trial Examiner and the Board in this respect (Tr. Vol. I, 107) did not meet the statutory "preponderance of the evidence" test provided for in section 10(c) of the Act, but was merely the drawing of an "expert" inference contrary to the intent of Congress (Conference Report, House Report 510, 80th Cong., pp. 53, 54, 55, 56).

Manifestly, then, the acceptance of this "expert" inference by the Court clearly demonstrates that it failed in its duty to canvass the record as a whole and to take into account whatever fairly detracted from the alleged substantiality of the evidence relied on by the Board. UNIVERSAL CAMERA CORP. v. NATIONAL LABOR RELATIONS BOARD, 340 U.S. 474, 488; NATIONAL LABOR RELATIONS BOARD v. PITTSBURG S. S. CO., 340 U.S. 498.

4.

The Court of Appeals, again, in summarizing petitioner's speech of March 26, 1948, stated:

> "Respondents made it abundantly clear that he was opposed to his employees joining a union" (196 F. 2d 274).

The above-quoted language is purely a gratuitous state-

ment on the part of the Court, finding no support in the Record as a whole, the Intermediate Report of the Trial Examiner (Tr. Vol. I, 102) or the Decision of the Board, and further demonstrates its failure to canvass the record as a whole. UNIVERSAL CAMERA CORP. v. NATIONAL LABOR RELATIONS BOARD, 340 U.S. 474, 488.

5.

The holding of the Board that Respondent "interfered with and coerced his employees in the exercise of rights guaranteed to them by Section 7 of the Act, and in violation of Section 8(a)(1) thereof," in that "on March 27, Respondent told Ogden, 'You know that you are hurting yourself by joining that (Union). You'll be cutting your wages. At the end of the year, you will come out with about $700 less than you take home now and you won't be working more than 40 hours a week * * * I can shut this plant, all of (the old employees) will lose their homes and wouldn't have anything or any place for their wife and kids' ", (Tr. v. I, pp. 117, 118), was based solely upon the testimony of one T. J. Ogden, the trial examiner rejecting in entirety the testimony of the only other witness testifying thereon, the petitioner. In accepting this finding, the Court erred in failing to take into account Respondent's version of this private conversation with Ogden which fairly detracted from the vague and contradictory testimony of Ogden (R. A. 197-198, 206-207).

6.

The petitioner testified without contradiction that over a period of years it had been his custom and practice to allow the free circulation of all petitions on company time and during working hours; that he had allowed free discussion concerning the union on company time during the union organizing campaign, and that production had suf-

fered as a result (B. A. 259, 282; R. A. 295, 335). Nevertheless, the Court of Appeals approved the Board's finding that petitioner had "interfered with and coerced his employees in the exercise of rights guaranteed to them by Section 7 of the Act, and in violation of Section 8(a)(1) thereof", by means of the discriminatory application of the "rule against union activity on company time or property by granting express consent to the circulation of the 'no union' petition on or about June 29" (Tr. p. 120, V. I). The approval of this finding by the Court of Appeals is but another instance of its failure to discharge its duty to canvass the record as a whole and take into account whatever in the record fairly detracts from the substantiality of the evidence relied on by the Board. UNIVERSAL CAMERA CORP. v. NATIONAL LABOR RELATIONS BOARD, supra, (340 U.S. 474)

II.

The Decision of the Court below is contrary to the settled decisions of this Court and other Courts of Appeals

Even if the testimony of Ogden referred to in paragraph numbered I A. (5), be true, which petitioner denies, the finding of the Board that as a result of such statement petitioner had violated Sections 7 and 8(a)(1) of the Act is clearly contrary to the settled decisions of this Court and the several courts of appeals which hold that isolated anti-union expressions do not constitute a violation of the Act, unless shown by substantial evidence that such statement did, in fact, interfere with, restrain or coerce petitioner's employees, and particularly Ogden, in the exercise of their rights guaranteed by the Act.

NATIONAL LABOR RELATIONS BOARD v. SANDS MFG. CO., 306 U.S. 332, 342; MARTEL MILL CORP. v. NATIONAL LABOR RELATIONS BOARD, 4 Cir., 114 F. 2d 624; E. I. DU PONT DENEMOURS AND CO. v. NATIONAL LABOR RELA-

TIONS BOARD, 4 Cir., 116 F. 2d 388; cert. den. 313 U.S. 571; NATIONAL LABOR RELATIONS BOARD v. ROSS GEAR AND TOOL COMPANY, 7 Cir., 158 2d 607; NATIONAL LABOR RELATIONS BOARD v. OZARK DAM CONSTRUCTORS, 8 Cir., 190 F. 2d 222.

There is no evidence that Ogden communicated this alleged statement to other employees; that said statement, if made, did in fact interfere with, restrain or coerce petitioner's employees, and particularly Ogden, in the exercise of their rights under the Act. The evidence is undisputed that Ogden remained as an employee of petitioner, and was openly active on behalf of the Union until after the Board election on September 14, 1948 (R. A. 207, 208). In fact, Ogden acted as a Union observer at said election (B. A. 201) and resigned voluntarily several days thereafter (R. A. 208).

III.

The decision of the Court below is in real conflict with the decision of the Sixth Circuit in Pittsburgh S. S. Co. v. National Labor Relations Board, 180 F. 2d 731

The court below, in its decision, stated, in part as follows:

> "As to statements made by respondent himself to the employees in his speech of March 26, 1948, and on other occasions, as to the consequences which might follow adherence to the union: When statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements, whether couched in language of probability or certainty, tend to impede and coerce employees in their right of self-organization, and therefore constitute unfair labor practice".

We have no quarrel with the accuracy of the doctrine there stated. What we do say, however, is that the above-

quoted language of the Court, when considered with the general tenor of the Board decision, clearly demonstrates that this is but one more instance of the Board using "unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct." PITTSBURGH S. S. CO. v. NATIONAL LABOR RELATIONS BOARD, 6 Cir., 180 F. 2d 731, 735; affirmed, NATIONAL LABOR RELATIONS BOARD v. PITTSBURGH S. S. CO., 340 U.S. 498.

In the latter case, the Court of Appeals for the Sixth Circuit, in speaking of the provisions of the Administrative Procedure Act (60 STAT. 237; 5 U.S.C. § 1001, et seq.); and the Taft-Hartley Act (61 STAT. 136; 29 U.S.C. § 141, et seq.), said, in part, as follows:

> "These statutes were designed to eliminate the wholesale use of hearsay, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of the case".
>
> * * *
>
> "With reference to the right of free speech the legislative history shows that the amendment embodied in § 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct.
>
> "The intent clearly to establish the right of free speech was further emphasized in House Conference Report No. 510, page 45". (180 F. 2d 733, 735, 736).

See also BONWIT TELLER, INC., v. NATIONAL LABOR RELATIONS BOARD, 2 Cir., 197 F. 2d 640, 644.

The Decision of the Board in this case, although doing lip service to the Act by carefully avoiding a specific finding that petitioner's utterances formed an integral part of a general course of unfair labor conduct, nevertheless dem-

onstrates its disregard of the Congressional intent in formulating Section 8(c) of the Act (Senate Report No. 105, 80th Cong., p. 23; House Report No. 245, 80th Cong., page 33; Conference Report, House Report 510, 80th Cong., p. 45).

The approval of the Board decision by the Court below, in the face of the provisions of the Act, the Congressional intent in formulating the same and the decision of the Court in PITTSBURGH S. S. CO. v. NATIONAL LABOR RELATIONS BOARD, supra (180 F. 2d 731), creates "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal". LAYNE AND BOWLER CORP. v. WESTERN WELL WORKS, 261 U.S. 387, 393; NATIONAL LABOR RELATIONS BOARD v. PITTSBURGH S. S. CO., 340 U.S. 498, 502.

IV.

The decision of the Court of Appeals in accepting and affirming the Board's Findings of Fact Numbered 6(d) through 6(p) of its Intermediate Report conflicts with the decisions of this Honorable Court and of the several circuits.

The Board's findings of fact set forth in paragraphs numbered 6(d) through 6(p) of its Intermediate Report (Tr. Vol. I, pp. 118-120), is in direct conflict with the settled decisions of this Honorable Court and of the Courts of Appeals of the several circuits (including the lower Court herein) which unequivocably hold that sporadic anti-union activities and isolated anti-union expressions by supervisory employees do not constitute a violation of the Act unless it is shown by substantial evidence that such activities were authorized or ratified by the employer and in fact did interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Act. NATIONAL LABOR RELATIONS BOARD v. SANDS MFG. CO., 306 U.S. 332; MARTEL MILLS

CORP. v. NATIONAL LABOR RELATIONS BOARD, 4 Cir., 114 F. 2d 624; E. I. DUPONT DENEMOURS AND CO. v. NATIONAL LABOR RELATIONS BOARD, 4 Cir., 116 F. 2d 388, cert. den. 313 U.S. 571; NATIONAL LABOR RELATIONS BOARD v. ROSS GEAR AND TOOL CO., 7 Cir., 158 F. 2d 607; NATIONAL LABOR RELATIONS BOARD v. OZARK DAM CONSTRUCTORS, 8 Cir., 190 F. 2d 222; NATIONAL LABOR RELATIONS BOARD v. MAYER, 5 Cir., 196 F. 2d 286.

Petitioner, and at least three of his supervisors, testified without contradiction that he had instructed his foreman to remain neutral during the union organizing campaign and not to interfere on either side (B. A. 104, 293; R. A. 96, 99, 275, 276, 411, 418, 333).

"The mere fact that an employer receives and enjoys the benefits of the unsolicited or unauthorized acts of another does not of itself amount to a ratification", NATIONAL LABOR RELATIONS BOARD v. MAYER (May 2, 1952), 5 Cir., 196 F. 2d 286, 290.

Conclusion

WHEREFORE, we respectfully submit that this petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 316

W. C. NABORS, D/B/A W. C. NABORS COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R-141-147) [1] is reported at 196 F. 2d 272. The findings of fact, conclusions of law, and order of the Board (R. 67-140) are reported at 89 NLRB 538.

---

[1] The symbol "R" refers to the transcript of the record. The symbols "B. A." and "R. A." refer to the appendices to the briefs in the court below of the Board and petitioner, respectively.

JURISDICTION

The judgment of the court below (R. 147) was entered on April 29, 1952. Petitioner's application for rehearing, filed on June 2, 1952 (R. 148-154), was denied on June 6, 1952 (R. 155). The petition for a writ of certiorari was filed on September 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, as the court below held, the Board's findings of fact are supported by substantial evidence on the record considered as a whole.

2. Whether the Board properly found that certain statements made by petitioner were coercive.

3. Whether petitioner is responsible under the Act for the coercive conduct of his supervisory personnel.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 12-15.

STATEMENT

Following the usual proceedings under Section 10 of the Act, the Board, on April 19, 1950, issued its findings of fact, conclusions of law, and order (R. 67-140). The Board found that petitioner had interfered with, restrained, and coerced his employees in violation of Section 8(a)(1) of the Act by threatening them with economic reprisals, by interrogating them concerning their union sympathies

and activities, and by assisting them in the circulation of an anti-union petition. The Board also found that petitioner had discriminatorily discharged or laid off 19 employees in violation of Section 8(a)(3) and (1) of the Act. The Board's subsidiary findings and the supporting evidence may be summarized as follows:[2]

On March 13, 1948, a group of petitioner's employees, having become dissatisfied with their wages, met with H. V. Smith, a business representative of the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, A.F.L., Local No. 79 (herein called the Union) in Shreveport, Louisiana, to discuss the possibility of organizing petitioner's plant (R. 101; B. A. 8, 18-19, 59, 159). Upon learning of the employees' union activities, petitioner and his supervisors undertook, by means of threats, interrogation, and discharge, to defeat the Union's organizational drive.

On March 15, two days after the employees' initial contact with the Union, Foreman Troegel warned employee Norwood, one of the union leaders, that petitioner "is just hard headed enough to shut [the plant] down before he will let the union come in here" (B. A. 24). On or about March 23, two days after a union organizational meeting was held, Supervisor Spears questioned Norwood about the attendance at that meeting (R.

[2] In the following statement, the record references preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

118-119; B. A. 24-25). On March 24, Spears warned Norwood about the "traffic" he was getting in signing the men up and told him he had better move his union business because "Old Man Edge [the guard] had his eyes on you" (B. A. 25, 299). The next day, March 25, Norwood was discharged (R. 75; B. A. 21). A few days after the discharge, Prothro, a supervisor (B. A. 295), admitted to an employee that Norwood had been laid off because of his union activity and expressed the hope that "none of my boys is in on this union" (R. 76; B. A. 142-143). About the same time, Wilfred Nabors, a first cousin of petitioner and foreman of the body shop, warned an employee that petitioner was going to do away with all union members, and stated "You know that one man done got laid off on account of this union" (R. 109, 118; B. A. 88, 302, 303).

Despite petitioner's campaign of interference and coercion, however, the Union succeeded in signing up 106 employees by March 26, 1948 (R. 101, 102; B. A. 12, 30, R. A. 9).

On that day, an hour and a half before he was scheduled to meet with Union Representative Smith to discuss recognition of the Union, petitioner Nabors assembled his employees and delivered a speech. While he stated in the course of his remarks that it was the employees' individual privilege to join or not to join, to vote or not to vote for the Union, he warned that if the Union came into the plant he would cut the work week from 45 hours to 40 (R. 102, 107, 117-118; B. A. 38,

52, 62-63, 105, 118, 176, 194), and announced that talking union on company time would not be permitted (R. 115; B. A. 43, 53, 66, 118, 229). He closed the meeting by telling the men that he was going to a conference with a man who wanted to get on their payroll, not his (R. 102; B. A. 38, 176).

The next day, in the course of a conversation with employee Ogden, petitioner cautioned Ogden that he was hurting himself by joining the Union, stating: "You'll be cutting your wages. At the end of the year you'll come out with about $700 less * * * and you won't be working but 40 hours a week * * *. I've got mine made. I've not got to run this thing. I can shut this down you know * * * there is a lot of boys here just like you Ogden, just buying their homes and trying to pay for them working in the plant. * * *If I shut this plant down, all of them would lose their homes and wouldn't have anything or any place for their wife and kids" (R. 107; B. A. 195).

During the period immediately following Nabors' speech, supervisors repeatedly questioned employees concerning their union activities and warned them against aligning themselves with the Union. Foreman Nabors, cousin of petitioner, interrogated several employees to find out who attended union meetings and which employees had signed union membership applications; he also told three of them (Solice, Leroy Brown, and Ryan) that petitioner "is going to do away" with the union employees and reduce the work week (R. 108-109, 118-120; B. A. 47-49, 87-88, 93-94, 98-100,

135-136, 208-209, 305, 309). Foreman Timmons commented in similar vein to employees Adams, Whitten, and Coward (R. 110, 119-120; B. A. 64, 114, 123, 230). Adams was further warned by Supervisor Segura that after shutting down the plant, petitioner will only "hire back the ones that didn't join the union" (R. 119; B. A. 115, 11). Supervisor Robertson told employee Welborn that the "boys are sure going to get messed up if they keep fooling with it" (R. 119; B. A. 79-80).

On April 8, 1948, because of a steel shortage, petitioner reduced the work force by ten percent (R. 104, 124; B. A. 279). Twenty-six employees were discharged on that day, leaving 219 at the plant (R. 70, 123; B. A. 223, 333-348, R. A. 334). Of the twenty-six employees laid off, twenty-three (88.5 percent) were union adherents. At that time the Union had procured a membership of only 106, approximately 43 percent of petitioner's employees (R. 123; R. A. 9). The twenty-three discharged employees included the instigators of the organizational drive, all the elected officials of the Union, and its staunchest adherents (R. 73, 75-85, 127; B. A. 8-11, 41-42, 59, 73-74, 79, 82-83, 90, 101, 103, 107, 121-122, 130-133, 137, 141, 150-153, 158-159, 163, 166-167, 172-173, 175, 183-187). In almost all cases petitioner ignored seniority in service (R. 76-83; B. A. 39, 65, 100, 108-109, 144-145, 318, 333-348). Moreover, practically all the employees involved in this proceeding testified, without contradiction, that petitioner had never criticized their past performance (R. 76-83; B. A. 43, 66, 103, 107,

113, 124, 137, 142, 146, 157, 171-172, 180-181, 247, 310, 323, 325, 327, R. A. 402), and petitioner and his supervisors admitted that a number of them were "good workers" (R. 81, 82; B. A. 234, 241, 306, 310, 327). Nevertheless, petitioner failed to consider any of the laid-off employees for reinstatement when he increased his staff in October, 1948, although almost all of them had requested reinstatement (R. 126-127; B. A. 53, 54, 55, 69-70, 81, 84, 96, 128, 156, 270, 274-275). The Board found that although a shortage of materials justified the layoff of some employees, 18 of the 26 were selected for layoff on a discriminatory basis (R. 70-86).

On April 12, 1948, the Union filed with the Board a petition for certification of bargining representatives. On June 30, 1948, two days before the hearing set on the petition, several employees circulated a petition of their own stating that the employees did not "need" a union; 158 employees signed this anti-union petition. (R. 114-115; B. A. 198, 213, 281-287.) Petitioner instructed Foreman Moak not to stop the movement of the anti-union petition in the plant, even during business hours (R. 115; B. A. 234). Another foreman openly warned an employee that he "better" sign the anti-union petition for otherwise "they might fire" him (R. 116, 120; B. A. 219).

Later, in one of several conversations held with employee Ogden just before the representation election on September 14, 1948, petitioner declared that he had not yet laid off all his union employees and "if you boys are represented by the Union,

you won't get any more bonus. That will be cut out * * *" (R. 107-108, 120; B. A. 202-204). The Union lost the election by a substantial majority (R. 105).

Upon the basis of the foregoing findings, the trial examiner and the Board concluded that petitioner had violated Section 8 (a) (1) and (3) of the Act. The Board ordered petitioner to cease and desist from the unfair labor practices found; to offer reinstatement to all of the employees discriminated against except two employees who did not desire reemployment; to make whole all the discharged employees for any losses they had incurred because of petitioner's discrimination; and to post appropriate notices (R. 87-91).

Enforcing the Board's order in full (R. 141-147), the court below held that "On the record as a whole, the Board's findings are supported by credible evidence," pointing out that "Although the evidence is in some respects circumstantial and contradictory, considered in the light of all the circumstances the proof makes a strong case against [petitioner]" (R. 145, 146). Rejecting petitioner's contention that his speech to the employees on March 26, 1948 and statements on other occasions did not constitute interference, restraint and coercion, but were privileged under Section 8 (c) of the Act, the court stated, "When statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements, whether couched in language of proba-

bility or certainty, tend to impede and coerce employees in their right of self-organization, and therefore constitute unfair labor practices" (R. 146).

ARGUMENT

Nothing in the petition poses any question of general importance in the administration of the Act, and the cases relied on by petitioner present no conflict with the decision of the court below.

The challenge to the substantiality of the evidence raises "a question which Congress has placed in the keeping of the Courts of Appeals" (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491) and does not warrant further review by this Court. Moreover, as the Statement shows (pp. 3-8, *supra*), and as the court below found (R. 145), the "proof makes a strong case against [petitioner]."[3]

Petitioner's contention (Pet. 18-21) that his statements to his employees were non-coercive expressions of opinion is wholly devoid of substance. These statements, which included threats of economic reprisal if the plant became unionized, were coercive on their face. And the fact that there was no evidence that the statements actually op-

[3] Petitioner contends that the Board improperly found his failure to take seniority into account in laying off employees to be evidence of discriminatory motivation. But this argument, predicated on the claim that seniority had never been a factor in the lay-off of petitioner's employees, is refuted by his own testimony at the hearing that he did "of course" take into account "the men who have been with the company the shortest period of time" (R. A. 291, 288).

erated to restrain and coerce particular employees is immaterial.[4]

Petitioner's characterization of his coercive statements and those of his supervisors as "isolated" and "sporadic" (Pet. 18-21) is equally unwarranted. The numerous threats, interrogations and coercive acts in which petitioner engaged find no parallel in any of the cases on which he relies.

Petitioner's final contention (Pet. 21-22), that he was not responsible for the coercive conduct of his supervisors because there was no evidence that such conduct was "authorized or ratified" by him, is foreclosed by the express provision in Section 2 (13) of the Act (Appendix, *infra*, p. 12) that in determining a principal's liability for the acts of his agents "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[5]

---

[4] See, *e.g.*, *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 231; *National Labor Relations Board* v. *Brezner Tanning Co.*, 141 F. 2d 62, 64 (C.A. 1); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7).

[5] This section, incorporated into the Act by the 1947 amendments, is a statutory affirmation of the principle established by this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 80-81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 518-521; and *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 598-599.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from

such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has

not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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